

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

LINDA C. TSEU, Executive
Director, on behalf of
the complaint filed by
DIANE DAVIS, deceased, by
her husband STEVE DAVIS,

v.

VOLCANO ISLAND FARMS, INC.
dba THE HAWAIIAN HEMP
COMPANY, and DWIGHT KONDO,

Respondents.

) Docket No. 94-003-E-R

) HEARINGS EXAMINER'S

) FINDINGS OF FACT,

) CONCLUSIONS OF LAW AND

) RECOMMENDED ORDER;

) APPENDIX A; ATTACHMENT 1

HEARINGS EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

A. Chronology of Case

The procedural history of this case is set forth in the
attached Appendix A.

B. Summary of the Parties' Contentions

The Executive Director asserts that Respondents Volcano Island
Farms, Inc. dba the Hawaiian Hemp Company (hereinafter "Company")
and Dwight Kondo (hereinafter "Kondo") violated H.R.S. § 378-2 when
it: 1) harassed Complainant Davis because of her race; and
2) terminated or constructively discharged Complainant because of
her race.

Respondents deny that the alleged harassment occurred and
contends that Complainant voluntarily left her job because she was
unhappy about increased production demands.

CIVIL RIGHTS COMMISSION
HONOLULU, HAWAII

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Having reviewed and considered the evidence and arguments presented at the hearing together with the entire record of these proceedings, the Hearings Examiner hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT¹

1. In December 1990 Respondent Volcano Island Farms Inc. was incorporated to do business in the State of Hawaii. At that time, Respondent Kondo (Japanese) was the president and sole shareholder of the corporation. The corporation first farmed tomatoes but later discontinued this line of business. (Ex. 23 at 16-17)²

2. In February 1991 Kondo attended a talk given by Aaron Anderson and Roger Christie about various uses of the marijuana (hemp) plant. Anderson and Christie were members of the Hawaiian Hemp Council, a non-profit corporation which promotes the legalization of marijuana. After the talk, Respondent Kondo met with Anderson and Christie and decided to form the Hawaiian Hemp Company to produce and sell products made from hemp cloth.

3. Respondent Hemp Company opened in December 1991. It is located in Pahoa, Hawaii. During Complainant's employment at the Company, the business was primarily engaged in making clothing, accessories and other products from hemp cloth. Kondo is the

¹ To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

² Unless otherwise indicated, "Ex." followed by a number refers to the Executive Director's exhibits; "Ex." followed by a letter refers to Respondents' exhibits.

president and chief operating officer of the Company and has the authority to hire, discipline and fire employees. (Prehearing Conference Order dated Sept. 2, 1994 stipulated facts nos. 2, 3)

4. Complainant Davis (caucasian) was a citizen of New Zealand. She and her husband, Steve Davis, moved to Hawaii in 1991 when she was about 44 years old. Complainant had been a seamstress for more than 15 years and a fashion model for about six years. In 1992 Complainant developed a thyroid problem and in 1993 she was diagnosed as having breast cancer. (Ex. 1 at 7-8, 34-37)

5. Some time around November 1991 Kondo met Complainant and asked her if she was interested in designing and sewing clothes for the Company. Complainant said she was interested and Kondo hired her as a clothing designer, seamstress and production manager. (Ex. 1 at 11, 56-57; Ex. 23 at 85-89)

6. Complainant began to work for the Company in January 1992. She designed all the clothing produced by the Company and supervised other seamstresses and cutters. She was the highest paid employee and earned \$8 and later \$10 per hour. (Ex. 1 at 11-12, 60; Ex. 23 at 130)

7. From January 1991 to June 1993, the Company had about four to six employees and several volunteers working at any one time. During this period, most of the employees and volunteers were caucasian and were supporters of the marijuana legalization movement.

8. At the beginning of Complainant's employment with the Company, Kondo was very pleased with Complainant's work and was

very friendly towards her. (Ex. 1 at 22-23; Ex. BB)

9. Kondo's attitude towards Complainant changed in the spring of 1992. At that time, the Company was working on a fashion show for the British Broadcasting Corporation. The Company had also hired two new seamstresses. During work on the fashion show, the new seamstresses told Kondo that Complainant had misspent Company money, had spent Company money on herself, was padding her hours and was gossiping about Kondo's sex life. Kondo felt that Complainant was cheating him and had betrayed his trust. (Exs. 14, BB, CC, DD)

10. In June 1992 Complainant quit³ her job at the Company after a seamstress told her that Kondo felt that Complainant was "ripping off the company" and had questioned the seamstress about Complainant's honesty. Complainant was upset that Kondo believed the new seamstresses' allegations, without first confirming them with her. (Ex. BB, DD)

11. Some weeks later, Complainant and her husband had a meeting with Kondo, Christie and another partner, Greg Lee, to discuss Complainant's work habits and working conditions at the Company. Kondo had already hired another seamstress, Ana Reinhardt (caucasian), to fill Complainant's position. Kondo wanted

³ In her August 4, 1992 letter to Kondo, Complainant states, ". . . I felt that if this is the way you choose to believe of me and act toward me, and particularly letting Star be your 'messenger', then there was no point in staying with you any longer . . . So I came downstairs and quit . . . It was never manipulation, Dwight, it was genuine anger and genuine quitting. I want to work in a happy, comfortable atmosphere, where if someone has something to say, they say it to my face, and not confide unfounded suspicions about me to other employees."

Complainant to sew for the Company on a piece work basis at home. Complainant refused because the hemp fabric was too heavy for her machine. (Ex. 1 at 207-208; Exs. CC, DD)

12. Reinhardt later proved to be less skilled than Complainant. In August 1992 the Company asked Complainant to return as a seamstress under the supervision of Reinhardt. Complainant agreed on the condition that the Company pay her medical benefits and start withholding her taxes. In September 1992 Complainant was rehired by the Company as a seamstress.

(Ex. 1 at 11, 27, 107; Exs. 14, 18; Ex. 23 at 97-99; Exs. BB, DD)

13. After Complainant was rehired, she and Kondo had several heated disagreements over economic matters unrelated to her race. They argued over her wages, receiving worker's compensation for a neck injury, whether the Company would withhold her taxes, when the Company would pay for her health benefits, whether the Company would pay for design classes she attended and the volume of clothing being produced. While the Company made five payments towards Complainant's COBRA health plan from her previous job, Complainant made the rest of the payments herself and didn't receive HMSA benefits from the Company until April 1993. The Company also didn't pay Complainant's 1992 taxes and withhold her taxes until March 1993 after Complainant threatened to report the Company to the IRS. The Company's failure to provide medical benefits and withhold taxes stemmed from its financial difficulties. No other Company employees had their taxes withheld, and no other employees received medical benefits until April 1993.

The partners constantly borrowed money to pay wages and expenses.
(Ex. 1 at 110-112, 214-215; Exs. 14, 18, B, P, X, NN)

14. Complainant and Kondo also had personality conflicts unrelated to Complainant's race. Kondo disliked Complainant because she was not involved in the marijuana legalization movement and because she continued to gossip about him in the sewing room. Kondo was also moody and temperamental with Complainant and other employees because the Company was having financial difficulties.
(Ex. 1 at 14-15, 23; Exs. 14, 18)

15. On the Company premises, Kondo often called or referred to certain caucasian employees, caucasian volunteers and caucasians in general as "fucking haole(s)", "haole bitch" or "fucking haole bitch" when he was angry or disappointed in them. Kondo said these words in a harsh or angry tone of voice. Complainant heard about a dozen of these remarks. (Ex. 1 at 14, 17, 19-20, 27, 75-77, 87, 146, 153-154, 160; Exs. 14, 18)

16. During Complainant's employment with the Company, she heard Kondo call her a "fucking haole" "haole bitch" or "fucking haole bitch" on the following occasions:

- a) During the fashion show, Respondent Kondo called Complainant a "fucking haole bitch" during a disagreement over how long it was taking Complainant to sew a dress. (Ex. 1 at 28, 146)
- b) Shortly after Complainant received her HMSA benefits in April 1993, she picked up an extension phone and heard Kondo remark, "fucking haoles bleeding me dry". (Ex. 18)

c) In May 1993, Kondo stopped Complainant as she was going downstairs from the sewing room and started to yell at her. He appeared to be under the influence of some substance and Complainant had never seen him that way before. Kondo ranted about several things and called her a "fucking haole bitch". After this incident, Complainant was afraid of Kondo and avoided being alone with him. (Ex. 1 at 15-17, 91, 169-170)

d) In June 1993 as Complainant left the premises of the Company on her last day of work, Kondo said "out of here you fucking haole bitch". (Ex. 1 at 89-90, 162-166; Ex. 14)

17. Kondo's racial comments upset Complainant and sometimes made her cry. The comments also made Complainant feel depressed, demoralized and degraded. She felt she was being treated "like a piece of dirt" and a "non-person". (Ex. 1 at 17-18, 21-23, 31-32)

18. On or about December 1992 Kondo's new girlfriend, Patricia Borton (caucasian) began living on the Company premises. Borton was a contract employee who did art work and cleaning for the Company. Borton had some knowledge of sewing and told Kondo that Complainant and the other hourly seamstress were not producing enough items and were overpaid. Borton also told Kondo that the Company didn't need to hire a cutter, since the seamstresses were each producing only 1 or 2 items of clothing a day. (Ex. B, Ex. 39 at 23, 40-41)

19. In early June 1993 Kondo, at the suggestion of Borton, considered paying the seamstresses by piece work instead of hourly. Kondo had Nancy Takayesu (Japanese), a piece work seamstresses who

usually sewed at home, work in the sewing room to monitor how much time it took to sew different items. He also placed Borton in the sewing room to cut fabric and monitor the production rate of the seamstresses. (Ex. B)

20. After working in the sewing room, Borton met with Kondo and Lee. They discussed the production level of the seamstresses, the Company's expenses and developed a production quota for the seamstresses. (Ex. 39 at 35)

21. On June 3, 1993 Kondo told Complainant that he might cut back her work hours because the Company was losing money, but that she would continue to receive medical benefits. Later that morning, Borton was in the sewing room with Complainant, Takayesu and Beverly Vance (caucasian). Borton commented to all the seamstresses that "no one seems to care about production" and that she, Kondo and Lee had decided that the hourly paid seamstresses had to produce items worth three times the amount they were paid in order for the sewing room to be profitable. (Ex. 1 at 26-27, 188-189; Ex. B; Ex. 39 at 34-36)

22. Complainant became upset and angry about Borton's presence in the sewing room and the new production demands. She went down stairs and spoke to Kondo about Borton's presence and comments. Complainant told Kondo that the new production demands were impossible to meet. Kondo stated that Borton was his girlfriend and had his permission to be in charge. Kondo also stated, "If you don't like it, you can leave." Complainant stated, "Is that what you want?" Kondo replied "Yes". Complainant stated,

"Oh well, I'm quitting then."⁴ Kondo then stated, "Fine, I'll get your check". Kondo went to his office to write Complainant her last paycheck. Complainant went back to the sewing room and collected her purse. She announced to the other seamstresses that she had "resigned". (Ex. 1 at 26-27; Ex. 16; Ex. 23 at 125-126; Ex. N at 25-27)

23. After June 3, 1993 the Company cut back its production of clothes and accessories. Takayesu continues to do piece work sewing at home and Borton occasionally sews a few items and is paid on a piece work basis. The Company also buys and resells products from other companies.

24. In October 1993 Complainant moved to New Zealand because her parents were helping to pay for her cancer treatment. She died of cancer on May 20, 1994. (Ex. 1 at 10; Ex.7)

III. CONCLUSIONS OF LAW⁵

A. Jurisdiction

1. Respondent Volcano Island Farms, Inc.

During Complainant's employment at the Company, Respondent Company was a corporation with one or more employees. It is therefore an employer under H.R.S. § 387-1 and subject to the provisions of H.R.S. Chapter 378.

⁴ These are exact quotes from Complainant's testimony given at her July 27, 1993 unemployment insurance hearing, about 1-1/2 months after her last day of work. (Ex. N at 26-27)

⁵ To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

2. Respondent Dwight Kondo

Respondent Kondo, as president, chief operating officer and majority shareholder, served in a supervisory position over Complainant. He exercised control over her hiring, firing and conditions of employment. He is therefore an agent of Respondent Company and an employer under H.R.S. § 378-1. In Re Santos, Docket No. 92-001-E-SH (January 25, 1993).

B. Racial Harassment

H.R.S. § 378-2 prohibits an employer from discriminating against an employee in the terms, conditions or privileges of employment because of race. Racial harassment that creates an intimidating, hostile or offensive work environment is a violation of the above statute. See, H.A.R. § 12-46-175(a); Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132, 30 EPD 39,066 at 57,726-57,727 (1989); Harris v. Forklift Systems Inc., 114 S.Ct. 367, 126 L.Ed. 2d 295, 62 EPD 42,623 at 77,397 (1993).

Although this Commission has no administrative rules on racial harassment, it has enacted rules prohibiting ancestry harassment⁶ and through administrative decision has established the elements

⁶ H.A.R. § 12-46-175(b) states:

Ethnic slurs and other verbal or physical conduct relating to an individual's ancestry constitute harassment when this conduct:

- (1) Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
- (2) Has the purpose or effect of unreasonable interfering with an individual's work performance; or
- (3) Otherwise adversely affects an individual's employment opportunity.

necessary for proving hostile work environment sexual harassment.⁷ I conclude that such rules and Commission decision precedent are instructive in cases involving racial harassment.

Accordingly, in the present case, the Executive Director is required to show that:

- 1) Complainant was subjected to racial slurs or other verbal or physical conduct relating to her race;
- 2) the conduct was unwelcome in the sense that the Complainant did not solicit or incite it and in the sense that the Complainant regarded the conduct as intimidating, hostile or offensive⁸;
- 3) the conduct was sufficiently severe or pervasive to alter the conditions of employment, such as having the purpose or effect of creating an intimidating, hostile or offensive work environment, of unreasonably interfering with Complainant's work performance or by otherwise adversely affecting Complainant's employment opportunity.

Because the Complainant in the present case is a caucasian woman, this objective standard is met if a reasonable caucasian woman would consider such conduct sufficiently severe or pervasive to alter the conditions of employment.

⁷ See, In Re Santos / Hawaiian Flower Exports, Inc., supra.

⁸ This second prong of the unwelcomeness inquiry is synonymous with the Harris requirement that the victim subjectively perceive the work environment as hostile or abusive.

Once the Executive Director makes out the above prima facie case of racial harassment, the burden of proof shifts to the employer to rebut such showing by: 1) proving that such conduct did not take place; 2) showing that the conduct was not unwelcome; or 3) showing that such conduct was trivial or isolated. In Re Santos / Hawaiian Flower Exports Inc., supra.

1. Whether the Racial Conduct Occurred

In the present case, the Executive Director has shown by a preponderance of the evidence that Kondo subjected Complainant to racial slurs. The evidence shows that Kondo called Complainant "fucking haole", "fucking haole bitch" and "haole bitch"⁹ at least four times in a harsh or angry tone of voice. Complainant also heard Kondo use the above slurs several times on Company premises when speaking negatively to or about other employees, volunteers or caucasian people in general.

Kondo denies that he said such words to Complainant or any other employee while on the Company premises. He argues that Complainant's testimony is not credible because she could not recall or was inconsistent in recalling the dates the slurs were made.

While Complainant had difficulty remembering the dates of each incident, I find her testimony credible. Complainant described in

⁹ In Hawaii, the word "haole" is a non-derogatory term used to denote a person of the caucasian race. However, the phrase "fucking haole" which Kondo said in harsh tones when he was angry with caucasian persons is a racial slur. Kondo admitted that the term "bitch" is a derogatory term for women. Therefore the phrases "haole bitch" and "fucking haole bitch" are racial and sexist slurs.

some detail the circumstances of each incident and her deposition testimony was for the most part consistent with written statements she submitted to the Executive Director. Her memory lapses are understandable given the medication she was taking during her depositions.

I find Complainant's testimony credible also because portions of it were corroborated by other witnesses. Other Company contractors, employees and volunteers such as Aaron Anderson, Maggie Frawley and even Kondo's girlfriend, Patricia Borton, heard Kondo use the term "fucking haole" on Company premises. Anderson also heard Kondo use the slur "haole bitch" in complaining about a female employee. Leslie Christianson and Thomas Kamaki Rathburn, persons who were living on the Company premises during a community theater production, heard Kondo use the terms "fucking haole(s)", "haole bitch" and "fucking haole bitch" when speaking negatively about Complainant, other employees and other caucasian people. Steve Davis also heard Kondo use such slurs while on the Company premises. In addition, while there were no witnesses to the stairwell incident, several persons, such as Dawn Hurwitz (a cafe owner and Complainant's friend), James Davis (Complainant's father-in-law), Christianson and Rathburn, testified that Complainant had told them about the incident.

2. Whether the Conduct was Unwelcome

The Executive Director has also shown by a preponderance of the evidence that the verbal conduct was unwelcomed. Complainant had never been called racial names and was shocked by

Kondo's use of such slurs. Complainant and other witnesses, such as Reinhardt and Andrew Keir (Complainant's neighbor) testified that Complainant never made racial remarks to anyone.

The evidence also shows that the conduct affected Complainant's emotional well being. Kondo's use of the terms "fucking haole(s)", "fucking haole bitch" and "haole bitch" in anger towards Complainant upset her and sometimes made her cry. The slurs also made Complainant feel depressed, demoralized and degraded. She felt she was being treated "like a piece of dirt" and a "non-person". Complainant became afraid of Kondo and avoided him at work.

3. Whether the Conduct Created an Intimidating, Hostile or Offensive Work Environment

Given the context, number of times and tone in which Kondo used the slurs "fucking haole", "haole bitch" and "fucking haole bitch", I also conclude that a reasonable caucasian woman would consider Kondo's conduct sufficiently severe and pervasive to create a hostile, intimidating and offensive work environment. See, Rodgers v. Western Southern Life Ins. Co., 792 F.Supp. 628, 634-635 (E.D. Wis. 1992), affirmed 12 F.3d 668, 63 EPD 42,729 (7th Cir. 1993) (supervisor's infrequent use of racial comments such as "nigger" and you Black guys are "too fucking dumb to be insurance agents" created hostile work environment).

I therefore conclude that Kondo racially harassed Complainant.

C. Termination Based on Race

The Executive Director alleges that Complainant was fired because of her race. However, the evidence shows that Respondents did not fire Complainant. On her last day of work, Complainant objected to Borton's presence in the sewing room and the new production demands. Respondent Kondo told Complainant that if Complainant didn't like the new arrangements, she could leave. Complainant admitted stating, "Oh well, I'm quitting then."

Since Respondents did not fire Complainant, I therefore conclude that Complainant was not fired because of her race.

D. Constructive Discharge

The Executive Director alternatively alleges that Complainant was constructively discharged because of her race. Constructive discharge occurs when a reasonable person in the employee's position would have felt that she was forced to quit because of intolerable and discriminatory working conditions. In Re Santos / Hawaiian Flower Experts, Inc., supra; Watson v. Nationwide Ins. Co., 823 F.2d 360, 43 EPD 37,298 at 48,293 (9th Cir. 1987). This test is an objective one and does not involve showing employer intent to force the complainant to resign. Santos, supra; Watson, supra.

In the present case, the Executive Director has not shown by a preponderance of the evidence that Complainant was forced to quit her job because of discriminatory working conditions. Complainant testified that she was forced to quit because of Borton's presence in the sewing room and the new production demands. While Borton's

presence and the new production demands may have been intolerable, they were not linked to any racially discriminatory motives or actions. Direct evidence of bias, standing alone, does not necessarily prove that a discriminatory motive was responsible for a particular employment action. Rather, the discrimination must be shown to be "brought to the ground and visited upon an employee". Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268, 49 EPD 38,936 at 57,013-57,014 (1989).

The evidence shows that Borton's presence and the new production demands stemmed from the Company's financial problems and Borton's desire to supervise the seamstresses. Kondo and Lee testified that the Company was having financial problems; Complainant herself observed that the partners were borrowing money to pay salaries. Borton had complained to Kondo about the seamstresses' low production for months and Complainant admitted that Borton's announcement of the new production demands was directed at everyone in the sewing room, not just at Complainant. Furthermore, Complainant was replaced by another caucasian woman (Borton), who was paid by piece work, the very method Borton had suggested to Kondo. Finally, the new production demands were made about one month after Kondo called Complainant a "fucking haole bitch" in the stairwell. Because of such time lapse, I also find no causal connection between this act of racial harassment and Complainant's quitting. See, Steele v. Offshore Shipbuilding Inc., 867 F.2d 1311, 49 EPD 38,839 at 56,465-56,466 (11th Cir. 1989) (no causal connection between sexual harassment and resignation when

plaintiffs quit two weeks after last harassing incident and employer's reprimand of harasser).

I therefore conclude that Complainant was not constructively discharged because of her race.

E. Liability

1. Respondent Company

In cases involving sexual and ancestry harassment, an employer is liable for its acts and those of its agents and supervisory employees regardless of whether the acts were authorized or even forbidden and regardless of whether the employer knew or should have known of their occurrence. H.A.R. §§ 12-46-109(c), 12-46-175(d). I therefore conclude that in race harassment cases, an employer is similarly liable for its acts and those of its agents and supervisory employees. Because Kondo was an supervisor and agent of the Company during Complainant's employment, Respondent Company is liable for Kondo's conduct towards Complainant.

2. Respondent Kondo

Kondo, as an agent of the Company, is an employer under H.R.S. § 378-1. Therefore, he is personally liable for racially harassing Complainant.

I therefore determine that Respondents Company and Kondo are liable for racially harassing Complainant.

F. Remedies

1. Back Pay

Because I conclude that Respondents did not fire or constructively discharge Complainant because of her race, she is not entitled to any back pay.

2. Compensatory Damages

The Executive Director requests that Respondents be ordered to pay Complainant compensatory damages of \$25,000 for the emotional distress she suffered. Pursuant to H.R.S. § 368-17, the Commission has the authority to award compensatory damages for emotional distress Complainant suffered as a result of Respondents' racial harassment. The Executive Director must demonstrate the extent and nature of the resultant injury and Respondents must demonstrate any bar or mitigation to this remedy.

The evidence shows that Complainant was very offended, upset, shocked and degraded by Kondo's use of racial slurs towards herself and other employees, volunteers and caucasian people in general. She sometimes cried after he made such remarks and felt "like a piece of dirt" and a "non-person". Complainant began to dread going to work and feared and avoided Kondo while at work. Her distress was observed in part by other witnesses. Steve Davis, Jim Davis, Hurwitz, Christianson and Rathburn testified that they saw Complainant become upset or cry when she told them about the stairwell incident and/or that she was called a "fucking haole bitch". Considering these circumstances, I determine that \$25,000 is appropriate compensation for Complainant's emotional distress.

3. Equitable Relief

The Executive Director also asks that the Commission order Respondents to:

- a) immediately cease and desist from discriminatory practices against all present and future employees on the basis of race;
- b) develop and implement a written non-discrimination policy, approved by the Commission and offer training programs on this policy to its employees;
- c) post notices, approved by the Commission in conspicuous places on the Company premises;
- d) publish the results of this contested case hearing in a newspaper published in the state and having general circulation in Honolulu, Hawaii.

Because Respondents used racial slurs at Complainant and other employees/volunteers, I recommend that the Commission order Respondents to immediately cease and desist from racially harassing all present and future employees.

Respondent Company does not have a written non-discrimination policy. I therefore recommend that the Commission order Respondent Company to develop a written non-discrimination policy within thirty (30) days of the effective date of the Commission's final decision in this matter. I also recommend that the Commission direct the Executive Director to submit his comments on Respondent Company's policy within thirty (30) days of receiving a copy of this policy. I also recommend that the Commission direct Respondent Company to adopt in substance the Executive Director's comments and accordingly modify its policy within fifteen (15) days of receiving the Executive Director's comments.

I also recommend that the Commission direct Respondent Company to conduct training for all employees on the non-discrimination policy within thirty (30) days of finalizing such policy.

The Commission should also direct Respondent Company to post notices provided by the Executive Director regarding its non-discrimination policy in a conspicuous place on its premises.

The best way to publicize this decision and Respondent Company's non-discrimination policy to the public is to require Respondent Company to publish the attached Public Notice (Attachment 1) in a newspaper published in the State of Hawaii having a general circulation in the City and County of Honolulu and the County of Hawaii.

4. Other Relief

I decline to award the remaining relief requested by the Executive Director. In terms of the deposition costs sought, H.R.S. § 368-17(a)(9) allows payment to a complainant of all or a portion of the costs of maintaining the action before the Commission. In the present case, Complainant did not intervene and maintain this action before the Commission. The video taped deposition of Complainant was conducted by the Executive Director, not by Complainant. Therefore the Executive Director should bear such costs. I also decline to award the Executive Director its costs in this action, since the above statute only allows a complainant to recover costs.

RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondents Company and Kondo violated H.R.S. § 378-3 by subjecting Complainant Davis to unwelcome racial conduct which created an intimidating, hostile and offensive work environment.

For the violation found above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondents Company and Kondo jointly and severally to pay Complainant \$25,000 as damages in compensation for her emotional injuries.
2. Respondents to immediately cease and desist from racially harassing all present and future employees.
3. Respondent Company to develop a written non-discrimination policy within thirty (30) days of the effective date of the Commission's final decision in this matter.
4. The Executive Director to submit its comments on Respondent Company's policy within thirty (30) days of receiving a copy of this policy.
5. Respondent Company to adopt in substance the Executive Director's comments and accordingly modify its policy within fifteen (15) days of receiving the Executive Director's comments.
6. Respondent Company to conduct training for all employees on the non-discrimination policy within thirty (30) days of finalizing such policy.

7. Respondent Company to post notices provided by the Executive Director regarding its non-discrimination policy in a conspicuous place on its premises.

8. Respondent Company to publish the attached Public Notice (Attachment 1) in a newspaper published in the State of Hawaii having a general circulation in the City and County of Honolulu and the County of Hawaii.

Dated: Honolulu, Hawaii, NOVEMBER 2, 1994.

HAWAII CIVIL RIGHTS COMMISSION


LIVIA WANG
Hearings Examiner

Copies sent to:

Calleen J. Ching, Esq. HCRC Enforcement Attorney
Dana S. Ishibashi, Esq. Attorney for Respondents

APPENDIX A

On March 16, 1994 the complaint in this matter was docketed for administrative hearing and a Notice Of Docketing Of Complaint was issued.

On March 30, 1994 the Executive Director filed its Scheduling Conference Statement. Respondents filed their Scheduling Conference Statement on April 8, 1994. A Scheduling Conference was held on April 13, 1994 and the Scheduling Conference Order was issued April 19, 1994.

On July 1, 1994 the Executive Director filed a Motion For Partial Summary Judgment to declare the inapplicability of res judicata and collateral estoppel of a September 7, 1993 Employment Security Appeals Office decision to this case and to dismiss Respondents' counter claims for compensatory and punitive damages from Complainant. On August 10, 1994 Respondents filed a Motion To Dismiss Complaint on the grounds that: 1) the Executive Director has no jurisdiction or standing to proceed on the complaint; 2) the complaint does not survive Complainant's death; 3) Respondents have been denied the right to confront and cross examine Complainant due to her death; and 4) Complainant's race discrimination claims are barred under the doctrines of res judicata and collateral estoppel by the September 7, 1993 Employment Security Appeals Office decision. A hearing on both motions was held on August 22, 1994 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor,

Honolulu Hawaii before this Hearings Examiner. In attendance were Calleen J. Ching, counsel for the Executive Director and Dana S. Ishibashi, counsel for Respondents. On September 6, 1994 the Hearings Examiner issued orders granting the Executive Director's Motion For Partial Summary Judgement and denying Respondents' Motion To Dismiss Complaint.

On August 12, 1994 notices of hearing and prehearing conference were issued. The Executive Director filed its Prehearing Conference Statement on August 26, 1994 and filed an Amended Prehearing Conference Statement on September 1, 1994. Respondents filed their Prehearing Conference Statement on August 26, 1994. On September 2, 1994 a prehearing conference was held and the Prehearing Conference Order was issued that day.

On September 8, 1994 Respondents filed a Motion In Limine seeking to exclude: a) any and all evidence alleging racial discrimination that took place prior to February 17, 1993; b) any and all evidence alleging racial discrimination against people other than the Complainant; c) any and all evidence that is not the result of direct and personal knowledge; and d) character evidence that is prior to February 17, 1993 and/or immaterial or irrelevant. On September 9, 1994 a hearing was held on Respondents' motion at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu Hawaii before this Hearings Examiner. In attendance were Callen J. Ching, counsel for the Executive Director and Dana S. Ishibashi, counsel for Respondents. At the hearing, the Hearings Examiner orally

denied Respondents' motion as to items (a) and (b) above. Regarding item (c) above, the Hearings Examiner stated she would allow the parties to make such objections during the hearing and rule on a case by case basis. Regarding item (d) above, the Hearings Examiner allowed the parties to present evidence of Complainant's and other witnesses' truthfulness, but disallowed all other types of character evidence.

The contested case hearing on this matter was held on September 12-16, 1994 at conference rooms C and B, State Department of Labor and Industrial Relations Building, 75 Aupuni Street, Hilo, Hawaii pursuant to H.R.S. Chapters 91 and 368. The Executive Director was represented by Enforcement Attorney Calleen J. Ching. Steve Davis, on behalf of Complainant Diane Davis was present during portions of the hearing. Respondents were represented by Dana S. Ishibashi and Respondent Kondo was present during the hearing.

The parties were granted leave to file proposed findings of fact and conclusions of law and/or hearing briefs. On October 10, 1994 the Executive Director and Respondents filed their post-hearing memoranda/briefs.

On September 23, 1994 the Executive Director filed a Motion To Re-Open Hearing For New Evidence based on certain events which occurred after the September 16, 1994 hearing on this case. A hearing on this motion was held on October 5, 1994 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu Hawaii before this Hearings Examiner. In

attendance were Callen J. Ching, counsel for the Executive Director and Dana S. Ishibashi, counsel for Respondents. On October 14, 1994 the Hearings Examiner issued an order denying the Executive Director's motion.

ATTACHMENT 1

PUBLIC NOTICE

published by Order of the
HAWAII CIVIL RIGHTS COMMISSION
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
STATE OF HAWAII

After a full hearing, the Hawaii Civil Rights Commission has found that Respondents Volcano Island Farms, Inc., doing business as The Hawaiian Hemp Company and Dwight Kondo, its president and chief operating officer, violated Hawaii Revised Statutes Chapter 378, Employment Discrimination, when they racially harassed an employee.

(Linda C. Tseu on behalf of the Complaint filed by Diane Davis, deceased, by her husband Steve Davis v. Volcano Island Farms, Inc., dba The Hawaiian Hemp Company and Dwight Kondo, Docket No. 94-003-E-R, [date of final decision] 1994).

The Commission has ordered us to publish this Notice and to:

- 1) Pay that employee's estate an award to compensate her for emotional injuries she suffered.
- 2) Immediately cease and desist from racially harassing all present and future employees.
- 3) Require The Hawaiian Hemp Company to develop a written non-discrimination policy, the Executive Director of the Hawaii Civil Rights Commission to comment on the non-discrimination policy, require The Hawaiian Hemp Company to modify its non-discrimination policy pursuant to the Executive Director's comments and to conduct training sessions for its employees on such policy.
- 4) Post notices provided by the Executive Director regarding the non-discrimination policy in a conspicuous place on company premises.

DATED: _____

BY: _____
Authorized Agent for
The Hawaiian Hemp Company